



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: MARCH 27, 2023

IN THE MATTER OF:

Appeal Board No. 627342

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 627340, 627341 and 627342, the claimant appeals from the decisions of the Administrative Law Judge filed December 16, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective March 29, 2021, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$5,400.00 in benefits recoverable pursuant to Labor Law § 597 (4), and Federal Pandemic

Unemployment Compensation (FPUC) benefits of \$6,000.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$1,710.00 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant is the co-owner and vice president of an incorporated business that does electrical work for commercial and residential customers. With the onset of the COVID-19 pandemic, the business shut down around March 18, 2020. The claimant filed a claim for benefits in 2020, reported that he was an officer of a corporation, and was paid Pandemic

Unemployment Assistance (PUA) benefits.

The business's operations in 2021 varied depending on the availability of work and funding for payroll. With support from the federal Paycheck Protection Program, the business paid its employees through March 2021, at which point no further funding was available. The business continued to maintain its office, business checking account, and business phone and internet lines. The claimant continued communicating with prospective clients and actively looking for new work for the business. The business resumed paying its employees in October 2021. On its 2021 S-Corporation federal income tax return, the corporation reported \$29,872.00 of business income. As a 50% shareholder, the claimant's personal share of the business's income was \$14,936.00.

After his benefit year expired, the claimant filed a new claim for benefits online on April 7, 2021. He answered "No" to a question that asked whether he had other business income. He gave this answer because he had income only from the electrical business that he had previously reported to the Department of Labor, and he did not have income from any other business. The claimant's wages from the electrical business were reported to the Department of Labor and incorporated into his claim. The claimant was not asked whether he was an owner of a business. The claimant received \$11,400.00 in benefits. The Department of Labor redetermined the claimant's entitlement to benefits by issuing Notices of Determination mailed May 3, 2022.

OPINION: Pursuant to Labor Law § 597 (3), "[a]ny determination regarding a

benefit claim may, in the absence of fraud or [willful] misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information." Since the determinations mailed May 3, 2022 were issued more than a year after some of the benefits in question were released, there must be a finding of willful misrepresentation for the Commissioner of Labor to have authority to issue these determinations with respect to the period prior to May 3, 2021.

The credible evidence establishes that the claimant filed a claim for benefits in 2020 and reported his relationship to his business. He was awarded PUA benefits, which were paid to claimants who were not eligible for benefits under state unemployment programs. In 2021, he filed a new claim. Nothing in this record indicates that the claimant was asked when he filed his new claim whether he owned a business. Therefore, he could not have made a willful

misrepresentation by not disclosing this information. In any event, the Department of Labor already knew from his prior year's claim that he owned the electrical business. The claimant saw a question on the online application that asked whether he had any other business income. He answered "No" to this question because his only business was the electrical business, and he did not have income from any "other" business. In the context of this claim history, the claimant's understanding of the online application's question was reasonable, and his answer was truthful based on his understanding. Therefore, we conclude that the claimant did not make a willful misrepresentation to obtain benefits. Accordingly, we conclude that the claimant is not subject to a forfeiture penalty or civil monetary penalty, and the Department of Labor does not have jurisdiction to redetermine the claimant's entitlement to benefits paid prior to May 3, 2021.

The credible evidence further establishes that the claimant was the co-owner of an incorporated business that engaged in various levels of activity over the course of 2021. The claimant credibly testified that, as a consequence of the COVID-19 pandemic, the business went months at a time without providing on-site electrical services to customers. During these periods, however, the business continued to maintain its office, business phone, internet connection, and business checking account. The claimant also continued to communicate with prospective clients to generate work. This level of activity is sufficient to establish that the

claimant stood to gain from the corporation's continued existence. Accordingly, we further conclude that the claimant was not totally unemployed and was ineligible for benefits. Therefore, the benefits paid to him on and after May 3, 2021 were overpaid. The overpaid FPUC benefits he received on and after May 3, 2021 are recoverable pursuant to federal law. We further note, however, that the question asked of the claimant with

respect to whether he had "other" business income was not clear in the context of this claim, and the claimant's incorrect legal conclusion regarding the question's meaning does not render his answer factually false (see *Matter of Valvo*, 57 NY2d 116 [1982]). Accordingly, we conclude that the overpaid regular unemployment benefits are non-recoverable, and only the overpaid FPUC benefits are recoverable. This matter is referred to the Department of Labor for recalculation of the FPUC overpayment.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed

from, are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 627340, the initial determination, holding the claimant ineligible to receive benefits, effective March 29, 2021, on the basis that the claimant was not totally unemployed, is modified to be effective May 3, 2021, and, as so modified, is sustained.

In Appeal Board No. 627341, the initial determination, charging the claimant with an overpayment of \$5,400.00 in benefits recoverable pursuant to Labor Law § 597 (4), and Federal Pandemic Unemployment Compensation (FPUC) benefits of

\$6,000.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, is modified to hold the regular unemployment benefits non-recoverable, hold the FPUC benefits paid to the claimant prior to May 3, 2021 non-recoverable, and hold the FPUC benefits paid to the claimant on and after May 3, 2021 recoverable, and, as so modified, is sustained. This matter is referred to the Department of Labor for recalculation of the FPUC overpayment.

In Appeal Board No. 627342, the initial determination, reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$1,710.00 on the basis that the claimant made a willful misrepresentation to obtain benefits, is overruled.

MICHAEL T. GREASON, MEMBER

Federal law provides that New York State can waive repayment of Pandemic Emergency Unemployment Compensation (PEUC), Federal Pandemic Unemployment Compensation (FPUC), Lost Wages Assistance (LWA), Mixed Earners Unemployment Compensation (MEUC) or Pandemic Unemployment Assistance (PUA) benefits overpaid to the claimant if the overpayment was not the claimant's fault and repayment would be contrary to equity and good conscience. For more information on the overpayment waiver process and instructions to request a waiver, please visit the New York State Department of Labor's website, <https://dol.ny.gov/overpayment-waiver-and-appeal-process>.